ABSTRACTS OF RECENT AMERICAN DECISIONS.

COURT OF CHANCERY OF NEW JERSEY.[1]

SUPREME COURT OF VERMONT.[2]

APPRENTICE.

Indenture valid where made—Legacy to—Equity—Setting aside Assets for Debt not yet due.—A court of equity has power in cases where there is a clear debt or duty to be paid or performed by the testator or his executors at a future day, to order that sufficient assets for the discharge of it be retained and secured by the executor before distribution of the estate. There is no adequate remedy at law in such a case, and the creditor ought not to be left to follow the legatees, or resort to the refunding bonds for the share of each: *Petrie* v. *Voorhees' Executor and Others*, 3 C. E. Green.

An indenture of apprenticeship with covenants, valid in the state where executed, will be enforced in the courts of this state, if not *contra bonos mores*, or against the policy of our law. The personal status of each individual is governed by the law of actual domicil: *Id.*

In general, executors are bound by all covenants of the testator except such as must be performed by him in person: *Id.*

In a contract of apprenticeship the covenant to support must be limited to the time of service, and cease when that ends. But the principle must be settled at law, and unless the right is so settled the aid of this court cannot be extended to prevent the distribution of the master's estate to protect a doubtful claim: *Id.*

To bar a claim against an estate under the rule of the surrogate, limiting creditors (Nix. Dig. 589, § 70), there must be proof that the notice was advertised or set up as required by law: *Id.*

A provision made by a master in his will for the support of his apprentice, if liberal, according to his circumstances and her condition, must be taken to be a satisfaction of his obligation to support her: *Id.*

BAILMENT.

Negligence.—Money deposited for the sole benefit of the bailor, without any special undertaking, on the part of the bailor, and without expectation of reward, constitutes a simple *depositum*. In a bailment of this character, the bailor is bound to exercise only slight diligence, and is responsible only for gross neglect: *Spooner* v. *Mattoon*, 40 Vt.

The plaintiff and the defendant were soldiers in camp, occupying tents ten rods apart. The plaintiff had considerable money, and fearing it might not be safe with him, had left it with the defendant, his friend, without expectation of reward, for safe keeping, for two nights, and called for it in the morning. The third night he so left it, but did not call for it in the morning, and the defendant being desirous of relieving himself of the care of it, started, before going upon duty, for the tent of the plaintiff, with the intention of returning it to him. For the purpose of not

[1] From C. E. Green, Esq., Reporter; to appear in Vol. 3 of his Reports.

[2] From W. G. Veazey, Esq., Reporter; to appear in 40 Vt. Reports.

exposing the pocket-book containing the money to view, having no pocket large enough to contain it, he placed it between his shirt and vest, intending to keep it secure by the pressure of his arm upon it. On the way, his attention was diverted, and the pocket-book slipped out, and was lost. The County Court excluded the inference that the defendant embezzled the money. *Held*, that the defendant was not guilty of gross negligence: *Id.*

Bills and Notes.

Want of Consideration—Jurisdiction of Equity to order Note cancelled.—The general rule is, that where a note is without consideration, relief cannot be had in equity on that ground merely. But where the note is negotiable and not void on its face, and, in case of a discontinuance or nonsuit, might be held until the evidence of its being without consideration could be had, and then a suit on it be brought against the administrators or the infant heir, to the amount of assets descended, a court of equity will order the security to be given up to be cancelled: *Kinney* v. *Metler*, 3 C. E. Green.

Contract.

Evidence—Lease—Verbal Agreement.—Where a written lease of certain premises, not under seal, for the term of one year, was produced, it was *held*, that evidence of a verbal agreement between the parties, entered into subsequent to the execution of said lease, and prior to its taking effect, by which its terms were changed, was admissible: *Flanders* v. *Fay*, 40 Vt.

The rule that a verbal agreement entered into between the parties to a simple contract in writing, before or at the time of the execution of such contract, is not admissible to vary or affect its construction, does not apply where it appears that the oral agreement was made subsequent to the execution of the written agreement, and was upon a new consideration: *Id.*

Corporation.

Railroad Company—Deed—Estate.—At common law a corporation has the legal capacity to take a title in fee to real property: *Page* v. *Heineberg*, 40 Vt.

The statutes of mortmain have never been adopted in this state, so that the common-law right to take an estate in fee, incident to a corporation, is unlimited, except by its charter and by statute: *Id.*

The Vermont Central Railroad Company acquired title to certain land in this state by warranty deeds, in the usual form, which land they subsequently abandoned for railroad purposes, having changed the location of their road-bed. *Held*, that the land did not revert, by reason of such abandonment, but that the railroad company, by said deeds, acquired a title in fee to the same: *Id.*

Custom.

Scire Facias—Evidence—Recognisance.—The custom of attorneys, in a certain place, to direct sheriffs as to whom they shall take as receiptors for property attached on writs made by them, is not admissible in evidence as having a tendency to show that an attorney of that place who commenced and conducted a certain suit, directed the sheriff serving

the writ, whom to take as receiptors: *Hine* v. *Pomeroy and Others*, 40 Vt.

Sec. 73, ch. 30, Gen. Stat., construed literally as to time when the action therein provided, directly upon the recognisance of a sheriff, may be brought. The right of action being held to exist *whenever* the liability of the sheriff and inability to serve process upon him concur: *Id.*

Easement.

Creation by severance of Estate.—Where the owner of lands devised the same in two parcels, one to A. and the other to B., the fact that he was accustomed in his lifetime to use an alley upon the lands devised to B. as a means of egress from his stable, upon the land devised to A., to the street, will not create an easement in B.'s land in favor of A., he being able to construct a way over the parcel devised to him, from the stable to the street, and such easement, therefore, not being *necessary* to the beneficial enjoyment of his land: *Felters* v. *Humphreys*, 3 C. E. Green.

Discontinuous easements not constantly apparent are continued, or created by a severance, only where they are necessary, and that necessity cannot be obviated by a substitute constructed on or over the dominant premises: *Id.*

The leading cases examined and commented upon: *Id.*

Equity.

Jurisdiction and Practice.—A suit in equity may be sustained to ascertain the height to which the owner of a dam is entitled to flow back water upon the lands above the dam: *Carlisle* v. *Cooper*, 3 C. E. Green.

Where upon the hearing, the evidence as to the facts in controversy is entirely satisfactory, the court will not order an issue, or wait for the result of a trial at law before making a decree. Nor will it on the hearing refuse relief because the complainant has delayed his suit, if it is clear, upon the evidence, that he ought to have the relief: *Id.*

A bill will not be dismissed upon motion of the defendant, after answer filed, where the court cannot adjudge that under the bill the complainant will not be entitled to relief at the hearing upon any evidence that he can offer: *Id.*

A suitor cannot be compelled to elect between a suit in equity to prevent future injury, and a suit pending at law to recover damages for past injury: *Id.*

A suit in equity cannot be delayed until the determination of a suit at law, where it is for a different object: *Id.*

Frauds, Statute of.

Resulting Trust not within.—The Statute of Frauds is a good defence except in the case of a resulting trust arising by implication of law and of actual fraud: *Eliza Brannin and Others* v. *Thomas Brannin*, 3 C. E. Green.

Where a defendant in execution, or the heirs of a decedent, rely on the promise of some one to buy the property for their benefit, at the sale under the execution, and in consequence neglect to attend the sale,

or bid for the property, and the person trusted buys for his own benefit, a court of equity will hold such person a trustee, notwithstanding the Statute of Frauds: *Id.*

The application of the principle cannot be invoked in this case: *Id.*

Husband and Wife.

Married Infant.—The power of a guardian over the person and property of an infant ceases at her marriage. From that time such guardianship devolves upon the husband. He can enter upon her property and permit others to enter upon it, without committing a trespass; he can also make leases voidable by her upon his death, or by her heirs at her death: *Porch and Others* v. *Fries and Others*, 3 C. E. Green.

An acknowledgment by a married infant is void: *Id.*

The husband of a married infant cannot sell or dispose of the growing wood or timber on the real estate of his wife: *Id.*

The deed of a married infant is void when it attempts to convey the wood and timber separately, as when it attempts to convey the soil with them standing upon it: *Id.*

By the Married Woman's Act (Nix. Dig. 503), in cases coming within the provisions of that act, the husband has, during her life, no interest or estate in the lands of his wife. She can sell them with his assent, and if she so sells and conveys them, she conveys them free from any interest or estate of her husband: *Id.*

That act destroyed the estate of tenancy by the curtesy initiate: *Id.*

The Married Woman's Act, although inconsistent with the estate by curtesy initiate, does not defeat the husband's curtesy at the death of the wife, provided she has not aliened her estate before. The act only protects her estate during her life; it does not, at her death, affect the law of succession as to real or personal estate: *Id.*

Neither a husband nor his lessees may commit waste upon lands in which he has only an estate by the curtesy: *Id.*

A lease made by the husband of a married infant of her lands, becomes valid for his life by the vesting of the estate by curtesy; and the heirs at law, being entitled to the reversion, have such privity of estate as will enable them to call the life tenant and his lessees to account for wood and timber cut as well during the life as after the death of the infant: *Id.*

Where the husband of a married infant permits the felling of trees upon her land, or severing any part of her realty, and so the change of the real to personal property for his own benefit, it will retain its character of real property so as to pass to those who would have been entitled to it if not severed: *Id.*

The heirs at law are entitled to an account for so much of the timber as has been taken away, and an injunction to restrain the removal of so much as still remains on the land: *Id.*

Wife as Witness.—The peculiar relations of husband and wife will not protect her from making a discovery relating solely to her own conduct and affecting only her own interests. In such case she may, under the recent acts, even be compelled to testify against herself: *Kinney, Adm'r.*, v. *Mettler*, 3 C. E. Green.

INFANT. See *Husband and Wife.*

Custody of.—The father is entitled to the custody of his children; and in no case will the courts take them away from him when he has them in his custody, fairly obtained, except where the father, from notorious grossly immoral conduct, or great impurity of life with which his children come in contact, so as to be in danger of contamination, is an improper person to have the custody of his own children. Infants under seven years of age are an exception, under the Act of March 20th 1860, Pamph. L. 437: *The State, ex rel. Baird*, v. *Baird*, 3 C. E. Green.

Upon a *habeas corpus*, brought by the father for his children, the court will not, as a matter of course, order them to be delivered up to him, but only in case they are improperly restrained of their liberty. The office of the writ is not to recover the possession of the persons detained, but to free them from all illegal restraints upon their liberty: *Id.*

If the infants are of sufficient years or discretion to judge for themselves, they will be examined, and if they are satisfied and wish to remain, the court will hold that they are not unduly deprived of their liberty, and will permit them to go with which of the parties they may elect: *Id.*

When infants are too young to exercise any discretion, the court will determine for them, and adjudge the custody to such of the parties as may be considered most advantageous to the infant: *Id.*

All the children were adjudged to remain in the custody of the mother: the two youngest because under seven years of age, and the mother a fit person to have the custody of them; the four eldest because, upon examination, they proved not to be restrained by their mother, those capable of making their election preferring to remain with her; and in the case of those not so capable, because it was adjudged to be for their benefit and advantage to be brought up with the others: *Id.*

INJUNCTION.

Against Trespass.—In general, a trespass will not be restrained by injunction; but where the trespass is an obstruction to a public highway, entitled to be used by all citizens, it is a nuisance of a character which the court will prevent by injunction: *The Morris Canal Co.* v. *Fagan and Others*, 3 C. E. Green.

The denial of the answer being fully responsive to the allegations of the bill upon which the injunction was granted, and supported by affidavits, injunction dissolved: *Id.*

LUNATIC.

Second Inquisition—Imbecility from Great Age.—This court can and will order a second inquisition of lunacy, either when the first is irregular or unsatisfactory from the finding being against evidence, or by a mistake of the jury as to their duty. Or it will order a second inquisition at some time after the first, if it appears that there is an evident change in the condition of the subject: *Matter of Collins*, 3 C. E. Green.

The substitution of a new commissioner for one appointed by the chancellor, without his approval or confirmation, and no one of the com-

missioners being a master of the court, is such an irregularity as would set aside the inquisition, if urged for that purpose, at or before the motion for confirmation, but would be without effect upon the argument of a rule to show cause why a commission should not issue: *Id.*

Imbecility for which a commission will issue, must amount to unsoundness of mind: *Id.*

The presumption of law is not against the soundness of mind of a person one hundred years of age: *Id.*

Where unsoundness of mind is proved and the question is as to the degree of it, and it appears that the subject never had any property to control until the issuing of the commission, the court and inquest would and should look at the value and importance of the property to be controlled by her, and also to the persons by whom she is surrounded and their conduct: *Id.*

Municipal Corporation.

Dedication of Streets—Map or Plan of Land with new Streets.—If the owner of a tract of land lays it out in lots and streets by a map publicly exhibited or filed in the proper public office, and sells lots laid out on said map by a reference thereto, he thereby dedicates to the public those streets on said map along which lots have been sold. Such dedication does not make them public streets or highways until the proper municipal authorities have accepted them as such, or in some way ratified the dedication: *Pope* v. *The Town of Union*, 3 C. E. Green.

The proper municipal authorities charged with laying out and maintaining streets, have the right, on the part of the public, to take and appropriate the lands so dedicated for the purpose for which they were dedicated, and to grade and construct streets and highways upon them without further compensation, or, in cases where it is required, to vest the title in the public upon a nominal consideration: *Id.*

The map or conveyance may qualify the dedication. But laying out land in lots and streets, clearly marked as such, and selling lots bounded on such streets, without any qualification, must be held as an absolute dedication: *Id.*

An intention to qualify the dedication concealed within the breast of the owner, or not expressed in some way on the map or in the conveyances, cannot be regarded: *Id.*

Whether a contemplated street would not be unwise and injudicious, and even if it would be productive of great injury to private property, cannot be considered by this court. It is a matter exclusively within the province of the municipal authorities: *Id.*

Whether the proceedings of municipal authorities have been according to law is within the jurisdiction of the courts of law: *Id.*

Ne Exeat.

Practice in regard to.—The writ of *ne exeat* will issue only for an equitable demand, and an action for an account is an equitable demand for which it will issue: *MacDonough* v. *Gaynor*, 3 C. E. Green.

It must appear by positive proof that there is a certain sum actually due, except in account, when the proof must show some sum due, the amount of which may be sworn to according to belief: *Id.*

The writ will be issued against a non-resident temporarily here, even if not in the state at the time, and it is not necessary that it should appear he is about to depart to avoid the jurisdiction, if his departure will defeat the suit: *Id.*

If the writ is served no *subpœna* is necessary, and the party cannot be discharged upon affidavit, but must make answer: *Id.*

In cases where the court feels constrained to discharge the writ, it will often require security to abide the decree: *Id.*

A *capias* where a *ne exeat* should have been sued out, and a bond taken thereon simply to appear at court in the cause on the first day of the next term, are irregular and will be set aside; but the order being right, the defendants ordered to give bond, with security, to answer and abide the decree of the court. Upon those terms writ and bond set aside with costs: *Id.*

Partition.

Title of Complainant disputed.—A tenant in common has a right to partition in chancery if he shows a title to a share: *Hay* v. *Estell and Others*, 3 C. E. Green.

When the title of the complainant, in a bill for partition, is disputed, it will not be settled upon the hearing in this court, but the complainant will be compelled to establish his title at law first, and the bill will be retained until he can so establish his title: *Id.*

But it must appear clearly to the court that there is an actual dispute, either by direct statement, or by words that amount to a direct denial of title, and not by a mere possible inference from the pleadings and proofs: *Id.*

Pleading.

Trespass—New Assignment.—In trespass, *quare clausum fregit*, the declaration alleged the breaking and entering, &c., and the destruction of the plaintiff's fence and gate, &c., with a *continuando*. *Held*, that the destruction of the fence and gate was not of the gist of the action, but matter of aggravation merely. Therefore, the defendant's plea was held good on general demurrer, in which he pleaded in defence, a public right of way, and that having occasion to use it, when, &c., he entered the *locus in quo* for that purpose, which were the trespasses mentioned, &c., without referring to the fence and gate: *Grout* v. *Knapp*, 40 Vt.

As the declaration admitted of the construction, either that the matter unanswered by the plea was insisted and relied upon as aggravating the damages merely, or that it was relied upon by the plaintiff as a distinct injury, and that he intended to recover for it, the defendant was at liberty to treat it as of the former character only, and having done so, the plaintiff, to avail himself of the latter construction, should have brought such matter forward by new assignment: *Id.*

Railroad.

Common Carrier—Negligence—Notice.—A railway company cannot, by their printed notices, receipts, and regulations, even when brought to the notice of the shipper, so limit the responsibility that they can carry freights for a reward, and, at the same time, not be liable for a failure to exercise ordinary care in the business: *Mann and Wheeler* v. *Birchard and Page*, 40 Vt.

The station agent at Ludlow, on the defendants' railroad, billed the plaintiffs' goods through to Charlestown, Mass., a point upon a connecting road, and receipted the pay for "transporting the merchandise from Ludlow to Charlestown," and this was shown to be in accordance with the usual course of business upon the defendants' road. *Held*, that these facts, without further proof, constituted proper and sufficient evidence to warrant the court in submitting to the jury the question whether or not the defendants undertook to transport the goods over the connecting roads to the point of their ultimate destination: *Id.*

The burden is upon the plaintiffs to prove that the defendants failed to exercise ordinary care and diligence in carrying the goods, but unusual and unexplained delay and failure to deliver the goods according to the general course of business, is *primâ facie* evidence of a want of ordinary care: *Id.*

SALE.

Warranty—Representation.—A simple representation, at the time of sale, that a lot is valuable and eligible, is but the expression of an opinion, and is never regarded as a warranty: *French* v. *Griffin*, 3 C. E. Green.

TRESPASS.

Fence—Charge to Jury.—In trespass *quare clausum*, for the entering of cattle, if the defendant does not defend on the ground of defect in the plaintiff's fence, it is not incumbent on the plaintiff to show that his fence was legal in order to make out his right of recovery, therefore, the charge of the court "that there being no evidence tending to show that the plaintiff's fence was not a legal fence, or satisfactory to the defendant, or that the defendant's cattle ever went on to the plaintiff's land by reason of the plaintiff not having a legal fence, the presumption is that the plaintiff's fence was legal," could work no detriment to the defendant, and was not subject to exception: *Sorenberger* v. *Houghton*, 40 Vt.

WARRANTY.

Covenant—Way.—An outstanding right of way, across one's premises constitutes a breach of the covenant of warranty: *Russ* v. *Steele*, 40 Vt.

The occupation of the way, in such a manner as the nature of the right secures to the adjoining proprietor, as occasion may require, and for all time, is such a disturbance of the possession of the plaintiff as, in law, amounts to an eviction to the extent of the adverse right or claim: *Id.*

WILL.

Soldier's Will—Infancy—Probate Court.—An infant cannot make a valid soldier's will: *Goodell* v. *Pike et al.*, 40 Vt.

The probate of this will was procured at the instance of the husband of the sole legatee, with full knowledge of the alleged testator's age, which was seventeen years. It was not claimed that the Probate Court was made aware of the alleged testator's infancy. No effort was made to advise the heir at law of the proceedings, and the probate was procured before he was informed of the decease. The will was made by the infant shortly after his enlistment while with the husband of the legatee, in whose family he was residing, and who had procured himself to be

appointed the infant's guardian in order to consent to his enlistment. *Held*, that these facts were sufficient evidence that the withholding from the Probate Court of all information of the alleged testator's infancy was wilful and corrupt, and the probate procured thereby was fraudulent and invalid: *Id.*

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